Supreme Court, U.S.
FILED
OCT 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(22) (24)

No. 88-1125 and 88-1309

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, ET AL., PETITIONERS

v.

STATE OF MINNESOTA, ET AL.

STATE OF MINNESOTA, ET AL., CROSS-PETITIONERS

v.

JANE HODGSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NO. 88-1125 AND SUPPORTING CROSS-PETITIONERS IN NO. 88-1309

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QUESTION PRESENTED

The United States will address the following question:

Whether the constitutionality of a state statute that requires notification of both parents that their unemancipated daughter has sought an abortion should be assessed under a standard of review that asks whether it is reasonably designed to serve a legitimate state interest and, if so, whether that statute is constitutional.

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INTEREST OF THE UNITED STATES

In *Webster* v. *Reproductive Health Services,* 109 S. Ct. 3040 (1989), the United States filed a brief as amicus curiae in which it joined the State of Missouri in urging the Court to abandon the framework for judicial review of abortion legislation established in *Roe* v. *Wade,* 410 U.S. 113 (1973), and to adopt in its place a standard of review that would ask whether such legislation is reasonably related to the advancement of legitimate governmental objectives. (A copy of our brief has been provided to the parties.) The Court was deeply divided in its response to that submission. Four Members of the Court expressed the view that *Roe* v. *Wade* and succeeding cases should be limited or overruled, 109 S. Ct. at 3056-3058 & n.15 (plurality

opinion); *id.* at 3064-3067 (opinion of Scalia, J.); a fifth Member was willing to reconsider *Roe* in a proper case, *id.* at 3061 (opinion of O'Connor, J.). In addition, although the plurality applied a standard of review similar to that endorsed by the United States, see *id.* at 3057, 3058, three dissenting Justices disagreed with that statement of the applicable standard, *id.* at 3076 (Blackmun, J., concurring and dissenting), and three other Justices authored separate opinions that did not expressly discuss the standard of review. See *id.* at 3058-3064 (O'Connor, J., concurring); *id.* at 3064-3067 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 3079-3085 (Stevens, J., concurring and dissenting). In *Webster*'s wake, there is now considerable uncertainty about the proper standard of review to be applied by courts in assessing the constitutionality of abortion regulations.

The United States has a substantial interest in the resolution of that question. Congress has previously enacted legislation concerning abortion. See, *e.g.*, Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976) (the Hyde Amendment); Title X of the Public Health Service Act of 1970, 42 U.S.C. 300 *et seq.*; the Adolescent Family Life Act of 1981, 42 U.S.C. 300z *et seq.* Moreover, federal regulations implementing Title X of the Public Health Services Act of 1970 are currently being challenged in the lower courts on the ground that they are inconsistent with *Roe* v. *Wade* and succeeding cases. *E.g.*, *Massachusetts* v. *Sullivan*, No. 88-1279 (1st Cir. May 8, 1989) (rehearing en banc granted). The manner in which the Court articulates the standard of review in this case could therefore affect the authority of Congress to enact legislation concerning abortion, and could have a direct impact on the outcome of pending constitutional challenges in the lower courts involving the federal government.

STATEMENT

1. In 1971, Minnesota enacted an exception to the common-law rule that required parental consent before medical treatment could be provided to minor children. 1971 Minn. Laws ch. 544. Section 3 of that statute authorized minors to "give effective

consent for medical, mental, and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. Ann. § 144.343 (West 1989). Because abortion was at that time a crime under Minnesota law,[1] the statutory exception for pregnancy-related medical care did not authorize minors to consent to an abortion.

On February 2, 1973, less than two weeks after this Court decided *Roe* v. *Wade* and *Doe* v. *Bolton*, 410 U.S. 179, the Minnesota Supreme Court held, on authority of *Roe*, that the Minnesota abortion statute was unconstitutional in its entirety. *State* v. *Hodgson*, 295 Minn. 294, 204 N.W.2d 199; *State* v. *Hultgren*, 295 Minn. 299, 204 N.W.2d 197. By striking down the Minnesota abortion statute, the Minnesota Supreme Court in effect enabled minors to consent to abortions under the exception for pregnancy-related medical care in Minn. Stat. Ann. § 144.343 (West 1989).

In 1981, the Minnesota legislature amended Section 144.343 by adopting the provisions at issue in this case. 1981 Minn. Laws ch. 228. The legislature did not attempt to require parental consent for an abortion.[2] Instead, in Subdivision 2 of the 1981 amendment the legislature qualified the statutory exception to the general parental consent requirement by directing "the physician or an agent" to notify both parents of an unemancipated minor in writing that their daughter has sought to have an abortion. Minn. Stat. Ann. § 144.343(2) (West 1989).[3]

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[1] Minn. Stat. § 617.18 (1971) (repealed 1974) contained an exception for abortions "necessary to preserve the life of the woman or of the child." Minnesota's prohibition of abortions dated from the late 1800s. See 1A M. Dunnell, Minnesota Digest 2d *Abortion* § 2.00 (3d ed. 1982).

[2] In the years between 1973 and 1981, this Court had ruled that a State cannot require parental consent in all cases before a minor can have an abortion. *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 74-75 (1976).

[3] Subdivision 3 requires notification of both parents only "if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the woman has one." Minn. Stat. Ann. § 144.343(3) (West 1989).

Notification can be delivered personally to the parents at their residence, or by certified mail if return receipt is requested and delivery is restricted to the parents. *Id.* § 144.343(2)(a) and (b). Performance of an abortion must be delayed "at least 48 hours" after written notification has been delivered. *Ibid.* Notice is not required in cases in which (1) the attending physician certifies that an abortion is necessary to prevent the death of the minor and there is insufficient time to notify her parents; (2) the abortion is authorized in writing by the person(s) entitled to notice; or (3) the minor declares that she is a victim of sexual or physical abuse, or neglect *Id.* § 144.343(4). The Act makes it a misdemeanor and a basis for a civil action for any person to perform an abortion without complying with its requirements. *Id.* § 144.343(5).

Subdivision 6 of the Act contains an alternative procedure to become effective if the above requirements are held invalid or are restrained by a court. Under the alternative procedure, a minor can obtain an abortion without notifying her parents if she can prove in court that she is sufficiently mature to make that decision for herself or that performing an abortion without notifying her parents is in her best interests. Minn. Stat. Ann. § 144.343(6)(c)(i) (West 1989). The Act specifies procedures to be followed in making those determinations. *Id.* § 144.343(6)(c)(ii)-(iv).

2. On July 30, 1981, just two days before the Act was to go into effect, petitioners filed this class action against the State in federal district court seeking a declaration that the Act was unconsitutional and an injunction against its enforcement. The district court issued a temporary restraining order and later a preliminary injunction enjoining the operation of the parental notification requirement contained in Subdivision 2, but not the alternative procedure in Subdivision 6. 88-1125 Pet. App. 14a. Thereafter, the court granted the State partial summary judgment, ruling that the alternative procedure specified in Subdivision 6 was facially constitutional. The court reserved for trial the question whether Subdivision 6 was being applied in an unconstitutional manner. *Id.* at 146a-157a.

After a bench trial, the district court held that the statute was unconstitutional in its entirety. 88-1125 Pet. App. 10a-52a. Relying on *Bellotti* v. *Baird* (*Bellotti II*), 443 U.S. 622, 647 (1979) (plurality opinion), the court ruled that the parental notification requirement in Subdivision 2 "unduly burden[ed]" a minor's right to an abortion. 88-1125 Pet. App. 38a. Relying on *Bellotti II, City of Akron* v. *Akron Center for Reproductive Health,* 462 U.S. 416 (1983), and *Planned Parenthood Ass'n* v. *Ashcroft,* 462 U.S. 476 (1983), the court determined that the alternative procedure set forth in Subdivision 6, standing alone, would constitutional, although it also found that this procedure did not serve the State's interests in fostering intra-family communication and protecting pregnant minors. 88-1125 Pet. App. 40a-45a. The court then separately considered the constitutionality of the requirement in Subdivision 3 that both parents be notified. The court held that requirement invalid, even though Subdivision 6 permitted a minor to avoid notifying both parents by obtaining court authorization for an abortion. *Id.* at 45a-47a. The court also separately examined the 48-hour waiting period required by Subdivision 2. The court held that "a 48 hour waiting period is excessively long" because it would compound the delays associated with making travel arrangements in rural areas, and because a shorter waiting period would serve the State's interests "as completely." *Id.* at 49a. After ruling that the two-parent notification requirement could not be severed from the remainder of the Act, the court held the Act invalid in its entirety and permanently enjoined the State from enforcing it. *Id.* at 51a-52a.

3. Both sides appealed. The en banc court of appeals, by a divided vote, affirmed in part and reversed in part. 88-1125 Pet. App. 73a-109a.[4] Relying on the plurality opinion in *Bellotti II*

[4] A panel had previously affirmed the district court's judgment in its entirety. 88-1125 Pet. App. 53a-72a. The panel later vacated its judgment and held the case in abeyance pending this Court's decision in *Zbaraz* v. *Hartigan,* 763 F.2d 1532 (7th Cir. 1985), aff'd by an equally divided Court, 484 U.S. 171 (1987). 88-1125 Pet. App. 158a-159a. When this Court evenly divided in *Zbaraz,* the full court of appeals granted rehearing en banc. Pet. App. 160a.

and on the combination of concurring and dissenting opinions in *H.L.* v. *Matheson*, 450 U.S. 398 (1981); see *id.* at 420 (Powell, J., concurring); *id.* at 434-454 (Marshall, J., dissenting), the court held unconstitutional the parental notification requirement of Subdivision 2. 88-1125 Pet. App. 81a. By contrast, the court upheld the alternative procedure set forth in Subdivision 6, ruling that it complied with *Bellotti II*, *Akron*, and *Ashcroft*. *Id.* at 81a-96a. The court also upheld the two-parent notification and 48-hour waiting period requirements, ruling that they serve legitimate state interests and do not unduly burden a minor's right to an abortion. *Id.* at 96a-97a.[5]

SUMMARY OF ARGUMENT

1. This Court's decisions in the highly contested abortion area have suggested a variety of different formulations for the applicable standard of review. Most of those decisions, starting with *Roe* v. *Wade* itself, have proceeded on the assumption that the regulation of abortion implicates a fundamental right, and thus should be subject to a heightened standard of judicial review, such as the "compelling state interest" standard applied by *Roe* itself. See 410 U.S. at 155. In *Webster* v. *Reproductive Health Servs.*, however, the plurality concluded that *Roe* v. *Wade* should be "modif[ied] and narrow[ed]," 109 S. Ct. at 3058; consistent with that judgment, the plurality would have upheld the viability testing required by the Missouri law challenged in that case because it was "reasonably designed" to

[5] The court also rejected petitioners' equal protection challenges to the Act. 88-1125 Pet. App. 98a. Petitioners appear to have abandoned those claims in this Court.

Judges Lay, McMillian, and Heaney dissented. Judges Lay and McMillian concluded that the two-parent notification requirement served no purpose if a minor's parents were divorced or separated and the custodial parent consents to an abortion. 88-1125 Pet. App. 99a-106a. They also concluded that the 48-hour waiting period unduly burdens a minor's right to an abortion. *Id.* at 106a-108a. Judge Heaney said that the two-parent notification requirement is unconstitutional, but a one-parent notification requirement would be valid. *Id.* at 109a.

serve legitimate state interests. *Ibid.* We believe that the Court should adopt the standard articulated by the *Webster* plurality as the applicable standard of review for all abortion regulations.

This Court's recent decisions demonstrate that a liberty interest is "fundamental" and therefore deserving of a heightened standard of review only if our Nation's history and traditions have protected that interest from state restrictions. But the Nation's history and traditions do not demonstrate that there is a fundamental right to an abortion; to the contrary, state laws condemning or limiting abortion were common when the Fourteenth Amendment was ratified. In particular, our Nation's history and traditions do not prove that an unemancipated minor has any such right independent of her parents' consent. At common law, a physician could not operate on a minor patient without the parents' consent. And before *Roe* and *Danforth*, only three of the 17 States that permitted some form of abortion exempted that procedure from the operation of the prevalent statutory or common-law rules requiring parental consent. Finally, even if an unemancipated minor were deemed (under *Roe* and *Danforth*) to have a right to an abortion regardless of her parents' consent, any such right does not imply a fundamental right to an abortion without her parents' knowledge. Thus, Minnesota's parental notification statute cannot be said to implicate a fundamental right. The appropriate standard of review for determining the constitutionality of that statute, therefore, is the standard endorsed by the plurality in *Webster*.

2. There can be little doubt that the Minnesota parental notification law is reasonably designed to serve a legitimate state interest. Parental notification requirements advance the legitimate state interests of informing and involving parents in decisions affecting their minor child's welfare. Given the grave medical, emotional, and psychological consequences of the abortion decision, the State can reasonably provide an opportunity for parental consultation in recognition of parents' traditional concern and responsibility for their child's upbringing. Such consultation benefits even mature minors, and those benefits are more secure when both parents are notified, rather than just one. In the majority of cases, both parents will be

responsible for their daughter's welfare, either because they are married and live together or because they hold custody jointly. Even a non-custodial parent may care very deeply about his or her daughter. Finally, because it is administratively infeasible to restrict notification to "functional" but not "dysfunctional" families, the State may require notification of both parents in all families to achieve the benefits demonstrable in most.

Parental notification requirements are not subject to a judicial cost/benefit analysis. The approach petitioners urge camouflages as impartial truths "expert" opinions that were unpersuasive in the legislative process. Due process does not authorize a court to review de novo the wisdom of a state law in the guise of assessing its factual support, its effectiveness, or its overall merit. Due process only permits a court to ask whether a law deprives a party of a historically protected liberty without sufficient justification. Because this law does not do so, the district court's "factual" findings are immaterial.

ARGUMENT

THE MINNESOTA PARENTAL NOTIFICATION REQUIREMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

I. ABORTION REGULATIONS, INCLUDING PARENTAL NOTIFICATION REQUIREMENTS, SHOULD BE UPHELD IF THEY ARE REASONABLY DESIGNED TO SERVE LEGITIMATE STATE INTERESTS

Because none of the opinions in *Webster* commanded a majority of the Court, there is now considerable uncertainty about the standard of review to be applied when abortion legislation is challenged under the Due Process Clause. That uncertainty is compounded in the present case by the divergent formulations of the applicable standard offered by the Court in previous cases concerning abortion and parental rights. In its initial decision on this issue, *Planned Parenthood* v. *Danforth,* 428 U.S. 52, 74 (1976), the Court held that the fundamental right recognized in *Roe* extends to unemancipated minors, and

framed the inquiry in terms of whether a requirement of parental consent would permit a "veto" of that right. Three years later, in *Bellotti II,* a plurality of four Justices reaffirmed *Danforth,* but appeared to formulate the question before the Court in terms of whether a provision for parental notice and consent would "unduly burden the right to seek an abortion." 443 U.S. at 640. And in *H.L.* v. *Matheson,* a different plurality sent conflicting signals about the proper standard. On the one hand, the plurality, using language reminiscent of *Roe* v. *Wade,* see 410 U.S. at 155, stated that a parental notification statute would be upheld if "narrowly drawn" to serve "important state interests." 450 U.S. at 413. But the *Matheson* plurality also quoted language from *Harris* v. *McRae,* 448 U.S. 297, 325 (1980), to the effect that such a measure would be upheld if "rationally related to the legitimate governmental objective of protecting potential life"—suggesting a more relaxed standard of review. 450 U.S. at 413.

The parties to this case devote relatively little attention to the standard of review, but they, too, disagree about what it should be. Petitioners appear to endorse a variation on one of the standards suggested by the *Matheson* plurality, stating that parental notification laws "must 'plainly serve[] important state interests [and be] narrowly drawn to protect only those interests.' " Pet. Br. 28-29 (quoting *Matheson,* 450 U.S. at 413). Petitioners do not, however, consider what impact *Webster* may have had on this standard. The State cross-petitioners briefly discuss the significance of *Webster,* and attempt to synthesize a multi-tiered standard of review based on the various opinions in that case. They conclude that although an "outright prohibition" of abortion is subject to strict scrutiny and may be sustained only upon the showing of a "compelling state interest," when a state statute "imposes some burden short of virtual prohibition or severe limitation it should be upheld if it rationally furthers legitimate public purposes." Cross-Pet. Br. 24. Thus, the cross-petitioners appear to endorse a standard of review similar to that applied by the *Webster* plurality, at least with respect to the issues presented by this case.

The question of the correct standard of review in abortion cases is manifestly in need of clarification by this Court if lower courts, litigants, and legislative bodies are to have adequate guidance in this difficult and contentious area. For the reasons set forth below, we believe that the standard articulated by the *Webster* plurality—which asks whether an abortion regulation is reasonably designed to serve a legitimate state interest—states the correct standard and should be applied both to questions involving parental authority and to abortion regulations generally.

A. Abortion Regulations Are Subject To Heightened Review Under The Due Process Clause Only If They Implicate A Fundamental Right

The Due Process Clause, by its terms, is primarily concerned with ensuring that interests in life, liberty, and property are afforded the "process" to which they are due. In addition, however, this Court's decisions establish that the Clause provides a measure of substantive protection to certain liberty interests. *Turner* v. *Safley*, 482 U.S. 78, 94-99 (1987); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The Court has been justifiably cautious in identifying such rights, recognizing that once it ventures beyond the "core textual meaning" of liberty as freedom from bodily restraints, the imputation of substantive content to the concept of liberty is necessarily a " 'treacherous' " undertaking. *Michael H.* v. *Gerald D.*, 109 S. Ct. 2333, 2341 (1989) (plurality opinion). As stated in *Bowers* v. *Hardwick*, 478 U.S. 186, 194 (1986), the Court "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

The general standard of review in assessing substantive due process claims is highly deferential to legislative judgments. As a rule, a state (or federal) statute that trenches upon a liberty interest will be upheld so long as it is rationally related to a legitimate state interest. See, *e.g.*, *Califano* v. *Aznavorian*, 439

U.S. 170, 176-178 (1978); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955). In certain narrow areas, however, the Court has gone further, and has held that particular liberty interests are subject to a more exacting standard of review. The critical determination in finding that a liberty interest will be afforded this heightened protection is the conclusion that it constitutes a "fundamental" right. *Michael H.*, 109 S. Ct. at 2341 (plurality opinion). Thus, the applicable standard of review in substantive due process cases is primarily a function of the method employed by the Court for identifying those rights that are deemed to be constitutionally fundamental.

In recent decisions, the Court has consistently stated that a right will be regarded as fundamental if it is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), or "deeply rooted in this Nation's history and tradition," *Moore*, 431 U.S. at 503 (plurality opinion). See *Bowers*, 478 U.S. at 192-194. Under either rubric, the applicable methodology is historical. *Michael H.*, 109 S. Ct. at 2342-2343 (plurality opinion); *Moore*, 431 U.S. at 504 n.12 (plurality opinion); *Bowers*, 478 U.S. at 192-194; *Palko*, 302 U.S. at 325. By limiting the scope of "fundamental rights" to those liberties historically regarded as essential to our Nation, the Court has sought, in the words of the *Michael H.* plurality, both to "prevent future generations from lightly casting aside important traditional values," and yet also to assure that the Due Process Clause does not become a judicial license "to invent new ones." *Id.* at 2341 n.2. See *Moore*, 431 U.S. at 504 n.12 (plurality opinion).

B. No Fundamental Right Is Implicated By The Minnesota Notification Requirement

Petitioners' claim that Minnesota's parental notification statute should be reviewed under heightened scrutiny rests on the assumption that the state law implicates a fundamental right. At bottom, of course, the fundamental right on which they rely is the right to abortion identified in *Roe* v. *Wade*. For the reasons discussed below and set forth more fully in our brief in *Webster* v. *Reproductive Health Servs.*, we continue to

believe that *Roe* was wrongly decided and should be overruled. But regardless of *Roe*'s continuing vitality, petitioners' argument in support of heightened scrutiny necessarily rests on two further premises: that the parents of an unemancipated minor may not exercise a "veto" over her decision to have an abortion—the holding of *Danforth*—and that the parents of an unemancipated minor are not even entitled to notice that she has sought an abortion. In our view, none of the three assumptions on which petitioners' case for heightened scrutiny is built is tenable: there is, in view of the Nation's history and traditions, no fundamental right to abortion; there is no fundamental right of a minor to an abortion without parental consent; and there is no fundamental right of a minor to an abortion without parental knowledge. If any of these three claims of fundamental right is rejected by the Court, and each should be, then the statute at issue must be upheld as long as it reasonably advances a legitimate state interest.

1. This Nation's History And Traditions Do Not Establish A Fundamental Right To An Abortion

If abortion is not a fundamental right, there is no appropriate basis for subjecting the Minnesota statute in this case to heightened scrutiny. As we explained more fully in our brief in *Webster*, there is simply no credible foundation for the proposition that abortion is a fundamental right. This conclusion follows whether the inquiry is framed broadly, in terms of a right to "privacy" or a right to "reproductive choice," or narrowly, in terms of a right to abortion. Compare *Michael H.*, 109 S. Ct. at 2344-2345 n.6 (opinion of Scalia, J.), with *id.* at 2346-2347 (O'Connor, J., concurring in part).

Roe discovered a fundamental right to abortion by generalizing broadly from previous decisions, which it characterized as recognizing a "guarantee of personal privacy." 410 U.S. at 152. Those decisions, the Court said, "make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U.S., at 453-454; *id.*, at 460, 463-465

(White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer* v. *Nebraska*, [262 U.S. 390 (1923)]." 410 U.S. at 152-153. The Court then concluded that "[t]his right of privacy * * * is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

If we look more specifically at the historical record regarding abortion, however, it cannot seriously be maintained that abortion is a right so deeply rooted in our history and traditions that it can be ranked as fundamental. To the contrary, state laws condemning or limiting abortion were common when the Fourteenth Amendment was ratified. In 1868, at least 36 state or territorial laws limited abortion, and 21 of those laws were in effect in 1973. *Roe*, 410 U.S. at 174-176 & n.1 (Rehnquist, J., dissenting).[6] Plainly, our history does not "exclude * * * a societal tradition of enacting laws *denying* that interest." *Michael H.*, 109 S. Ct. at 2341 n.2 (plurality opinion). In fact, the historical record in favor of the liberty in question here is no stronger than it was in *Michael H.* or *Bowers*, where the Court found no warrant in the common-law tradition for identifying a fundamental right to visitation privileges for adulterous fathers, or a fundamental right to engage in homosexual sodomy.

Moreover, even if the decisions relied upon by *Roe* may be said to establish a "right of privacy"—or a right "whether to accomplish or prevent conception," *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977)—it does not follow that this right extends to the decision to have an abortion. A decision not to conceive does not entail the deliberate destruction of fetal life; a decision to abort manifestly does. *Harris* v. *McRae*, 448 U.S. at 325; *Carey*, 431 U.S. at 690. The State's interest in protecting fetal life throughout pregnancy thus provides an entirely adequate basis for limiting any right of privacy or procreative choice to the decision not to conceive. Here again, the

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[6] The abortion of a fetus after "quickening" was regarded as a crime at common law. *Roe*, 410 U.S. at 132-136. The earliest English abortion statute, adopted in 1803, made abortion a crime throughout pregnancy. *Id.* at 136.

interest in protecting fetal life is at least as compelling as the interest in promoting family autonomy (at issue in *Michael H.*) or the interest in condemning homosexual conduct as immoral (at issue in *Bowers*)—both of which were found by the Court to be sufficient to defeat any claim that a generalized right to privacy should be extended to those cases. See *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792-793 & n.2 (1986) (White, J., dissenting); *id.* at 828 (O'Connor, J., dissenting). In short, whether viewed in terms of a general right of privacy or reproductive choice, or more narrowly in terms of abortion itself, it cannot reasonably be said that the right to abortion is fundamental.[7]

2. An Unemancipated Minor Does Not Have A Fundamental Right To An Abortion Without Her Parents' Consent

Even were the Court not to revisit the underlying question whether there is a fundamental right to an abortion, it may wish to reconsider the next step in petitioners' argument for heightened scrutiny. This Court held in *Danforth* that an unemancipated minor has a fundamental right to abortion that may not be qualified by "an absolute, and possibly arbitrary, veto" by her parents. 428 U.S. at 74. If that conclusion was in error—that is, if the State can constitutionally require that parents must give their *consent* to a minor's abortion—then there can be no claim that an unemancipated minor has a fundamental right to avoid *notice* to her parents that she has sought an abortion. Notice is indisputably a less intrusive form of parental involvement than consent, which necessarily entails notice.

1. Our history and traditions provide no support for the notion that a minor has a fundamental right to an abortion without her parents' consent. That conclusion follows, regardless of the level of specificity at which this inquiry is made.

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[7] By contrast, a state law *mandating* abortions would present a starkly different question. See *Cruzan* v. *Missouri Dep't. of Health*, cert. granted, No. 88-1503 (to be argued Dec. 6, 1989). Our Nation's history and traditions establish that a competent adult may generally refuse unwanted medical intrusions. This right would, we believe, extend to an unwanted abortion.

At the most general level, there can be no doubt that our legal traditions recognize the right of parents to control their childrens' upbringing. Anglo-American law has "historically * * * recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979); *id.* at 621 (Stewart, J., concurring in the judgment) (collecting authorities). See Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 605, 615-619. Accordingly, common law courts were extremely reluctant to interfere in the parent-child relationship as long as the parents did not treat their children cruelly or immorally. See, *e.g.*, *In re Agar-Ellis*, [1883] 24 Ch. D. 317 (C.A.); Recent Development, *Minors' Rights to Medical Care*, 14 J. Fam. L. 581, 581-583 (1975). This strong tradition of parental control continues today. Every State limits the participation of minors in a substantial number of activities in which adults may engage, such as marriage, voting, or driving a car. Such restrictions "reflect[] the simple truth derived from our communal experience, that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life." *Stanford* v. *Kentucky*, 109 S. Ct. 2969, 2988 (1989) (Brennan, J., dissenting).

This Court's decisions, rendered in a variety of constitutional contexts, reflect the same understanding. The Court has long recognized that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535. Consequently, this Court has repeatedly acknowledged that "a natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children" ' " is itself a significant liberty interest. *Santosky* v. *Kramer*, 455 U.S. 745, 758-759 (1982) (citations omitted); see also, *e.g.*, *Michael H.*, 109 S. Ct.

at 2342 (plurality opinion); *Matheson,* 450 U.S. at 410; *Wisconsin* v. *Yoder,* 406 U.S. 205, 231-233 (1972); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); *Meyer* v. *Nebraska,* 262 U.S. 390, 399-401 (1923). Indeed, if there is a fundamental right implicated by this case, this Court's decisions suggest it is the right of *parents* to direct the upbringing of their children, not the right of children to evade parental control.

The conclusion drawn from the general historical understanding of parent-child relations is reinforced by more specific consideration of the traditions regarding the provision of medical treatment to children. The rule at common law was that a physician could not treat a minor without parental consent. W. Keeton, *Prosser and Keeton on The Law of Torts* ch. 4, § 18, at 115 (5th ed. 1984). Over time, common law courts developed limited exceptions to this rule for emergencies, emancipated minors, relatively safe operations for mature minors, and necessary lifesaving treatment. *Id.* at 114-118; L. Nolan, *The Legal Status of Parent and Child 1986,* at 161-172 (1987). But all jurisdictions today still follow the common-law rule unless it has been modified by case law or statute. L. Nolan, *supra,* at 161. See *Stanford,* 109 S. Ct. at 2988 (Brennan, J., dissenting) (37 States by statute fix 18 as the age of consent for medical treatment); *Bowen* v. *American Hosp. Ass'n,* 476 U.S. 610, 627-628 & n.13 (1986) (plurality opinion) (summarizing current law).

Even when we consider history and tradition at the most specific level—and ask whether a minor was generally recognized to have a right to an abortion without parental consent—the answer is the same: there was no such generally recognized right. Specifically, in those States that had legalized abortion to some extent prior to this Court's decision in *Roe* v. *Wade,* the general rule was that parental consent *was* required before the operation could be performed on an unemancipated minor. Of the 17 States that permitted some form of abortion in 1971, eight had laws expressly requiring minors to obtain parental consent, and six continued to apply the common-law rule of

parental consent. Pilpel & Zuckerman, *Abortion and the Rights of Minors,* 23 Case W. Res. L. Rev. 779, 783-785 (1972). Only three state courts had construed state laws allowing minors to consent to pregnancy-related medical care to permit a minor to obtain an abortion without parental consent. *Ballard* v. *Anderson,* 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971); *In re Diane,* 318 A.2d 629 (Del. Ch. 1974). See *In re Smith,* 16 Md. App. 209, 225, 295 A.2d 238, 246 (1972) (a minor may refuse to have an abortion over parent's objection). See also Note, *The Minor's Right to Abortion and the Requirement of Parental Consent,* 60 Va. L. Rev. 305, 305 (1974).

Thus, whether considered at the most general level of parent-child relations, or at the most specific level of a minor's right to have an abortion without her parents' consent, the historical record speaks with a single, powerful voice. Against this background, it simply cannot be said that a minor's right to have an abortion without her parents' consent is so "rooted in the traditions and conscience of our people" as to be deemed fundamental. *Michael H.,* 109 S. Ct. at 2341 (plurality opinion). To the contrary, the conscience of the American people, as embodied in law, *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934) (Cardozo, J.), stands unmistakably for the proposition that unemancipated minor children are not free to make such profoundly important decisions without the involvement of their parents.

2. Nor does the reasoning of *Danforth,* as amplified by *Bellotti II,* support the notion that a minor has a fundamental right to an abortion without obtaining her parents' consent. Starting with the premise that the State cannot (subject to certain qualifications) veto an adult's decision to have an abortion—the holding of *Roe*—*Danforth* held that a State cannot allow parents to veto their unemancipated daughter's decision to have an abortion. 428 U.S. at 74. But that conclusion does not follow from the premise. While a State cannot ordinarily veto an adult's decision to obtain (or forgo) medical care, a State *can* give a minor's parents the right to select medical care for their child. Thus, even if the decision whether to have an

abortion is ultimately only a medical decision (as *Roe* treated it, 410 U.S. at 156-162), the State should be free to leave the decision to a minor's parents, just as the State leaves all other medical decisions to them.[8]

Danforth also reasoned that a parental consent requirement was unlikely to promote family unity and parental authority when a minor's pregnancy "already has fractured the family structure." 428 U.S. at 75. The *Bellotti II* plurality elaborated on this point, stating that the question of whether a minor should have an abortion is fraught with "grave and indelible" consequences, and that the parent's decision may be "arbitrary." 443 U.S. at 642-643.

The issue, however, is not whether a minor's unwanted pregnancy is a stressful event having lasting consequences both for her and her family; it surely is. And the question is not whether certain parents will exercise poor judgment in deciding what is in the best interests of their daughter; they surely will. Rather, the issue is whether a State may reasonably conclude that a minor's parents are, as a general matter, better suited to make these critical decisions than a minor and her physician, or a minor and her physician in conjunction with a judge. There is no legal presumption that parents will not act in the best interests of their child; to the contrary, the presumption lies in precisely the other direction. *Parham,* 442 U.S. at 602. And unless the minor's life is at risk, her pregnancy is the result of incest, or she is the victim of parental abuse, there is no objective standard by which to determine whether the parents' decision is "arbitrary." The pregnant minor is confronted with choices that implicate the most basic values—not just about the minor's future options, but also about the morality of abortion itself. It strains credulity to think that these matters are more properly resolved by the minor and persons who, in all probability, are

[8] To be sure, a State can intervene in the parent-child relationship, for example, to supply a child with life-saving medical care. *Jehovah's Witnesses* v. *King County Hosp.*, 390 U.S. 598 (1968), summarily aff'g 278 F. Supp. 488 (W.D. Wash. 1967). But just as due process does not require the State to intervene even in that setting in order to protect a minor from her parents, *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989), due process should not compel a State to allow a physician to intervene either.

strangers she will never meet again, than by the minor in consultation with those who have a lifetime commitment to her care, nurturing, and upbringing.

3. An Unemancipated Minor Does Not Have A Fundamental Right To An Abortion Without Her Parents' Knowledge

Pretermitting the two foregoing questions—whether there is a fundamental right to an abortion and whether there is a fundamental right on the part of minors to an abortion without parental consent—petitioners still must show that the fundamental right recognized in *Roe* and *Danforth* extends to a provision requiring only that parents be given *notice* of their minor daughter's request for an abortion. Parental notification differs in obvious respects from parental consent. Notification laws like Minnesota's do not empower parents to "veto" their child's decision; at most they postpone that decision for a brief period in order to allow parents to discuss that decision with their child.[9] In fact, a parental notification requirement does no more than preserve for parents the opportunity they have traditionally enjoyed to discuss with their daughter significant decisions that arise during her minority, and to be aware of important actions taken by third parties toward her.

There is utterly no support for the proposition that a minor has a fundamental right to keep her parents in the dark about her welfare. The historical materials surveyed above concerning the right of parents to control the upbringing of their children and their right to select the medical procedures performed on

[9] The Minnesota statute clearly differs from the laws held invalid in *Akron, Bellotti II,* and *Danforth.* It requires that written notification be personally delivered to the parents, Minn. Stat. Ann. § 144.343(2) (West 1989), but there is no requirement that the parents (or anyone else) provide written evidence that such notice was given. The attending physician or his clinic can send the notice by mail, *id.* § 144.343(2)(b), and the 48-hour waiting period can run while the abortion is being scheduled, 88-1125 Pet. App. 97a n.18. Only one parent need be notified if the other parent cannot be located by reasonably diligent effort. Minn. Stat. Ann. § 144.343(3) (West 1989). It is an affirmative defense that a person attempted with reasonable diligence to deliver notice, but was unable to do so. *Id.* § 144.343(5). None of these provisions is similar to a parental veto.

their children—including abortion—conclusively refute the notion that a child has a fundamental right to conceal important facts about her physical condition and well-being from her parents.[10] In the final analysis, petitioners' objection to notifying parents—*i.e.*, that disclosure of their minor daughter's pregnancy and desire for an abortion will disrupt everyone's life without any attendant benefit—supports concealing the pregnancy from the parents even *after* their daughter has had an abortion. But there is no support in this Court's cases or common sense for the remarkable principle that a minor has a fundamental right to keep her parents in ignorance about her welfare. What petitioners' argument ultimately reveals is how far afield their claim is from the history and traditions of this Nation, and from what due process can be said legitimately to protect.

C. The "Undue Burden" Analysis Does Not Constitute A Substitute For A Standard of Review

In *Bellotti II*, the plurality analyzed the parental consent provisions at issue in that case not in terms of a conventional standard of review, but rather in terms of whether the statute would "unduly burden the right to seek an abortion." 443 U.S. at 640. Similarly, Justice O'Connor, in her dissenting opinions in *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. at 452-475, and *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. at 827-833, examined a variety of abortion restrictions under an "undue burden" analysis. Indeed, the United States, in an amicus brief filed in *Akron*, also urged the Court to adopt an "undue burden" approach.

Although we believe that there is a limited role for an "undue burden" analysis in constitutional adjudication, we do not believe, upon full reflection, that the "undue burden" inquiry

[10] Plaintiffs are correct that a number of States, including Minnesota, have enacted laws increasing a minor's right to consent to medical care. See generally L. Nolan, *supra*, Apps. A-F, at 442-461. Abortion, however, is not among those medical procedures.

can legitimately substitute for a standard of review. The basic problem is revealed within the very formulation of the *Bellotti II* plurality: the question is whether a statute will "unduly burden *the right to seek an abortion.*" 443 U.S. at 640 (emphasis added). In other words, undue burden analysis *presupposes* that there is a fundamental right potentially implicated by the regulation at issue; the analysis cannot assist in distinguishing between fundamental rights and other liberty interests. Thus, unless we are to embrace the assumption that *any* regulation touching upon the question of abortion necessarily implicates a fundamental right, the undue burden analysis begs the question at issue: whether there is a fundamental right at stake that requires application of heightened scrutiny.

The "undue burden" analysis suffers from an additional infirmity when coupled with a judicially created, highly abstract, or generalized right—such as the "right to privacy" or the "right to abortion." In such a context, asking whether a particular measure unduly burdens the right provides no meaningful guidelines for assessing the weight of the competing interests, or for determining how much deference to give to legislative judgments. The only measure of constitutionality would be the courts' own subjective assessment of what is "due" or "undue" in any particular context. In these circumstances, the undue burden analysis would offer "no guide but the Court's own discretion," *Baldwin* v. *Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting); see *Webster*, 109 S. Ct 3066 n.* (Scalia, J., concurring in part and concurring in the judgment), and would serve only to mask judgments made on the basis of assumptions that would remain unarticulated. In our view, great caution should be exercised in resolving important constitutional controversies under the "undue burden" mantle.[11]

[11] This is not to say that the "undue burden" approach may not play a proper role in cases where the relevant universe of constitutional rights is fully specified and well defined. In those circumstances, we believe that the "undue burden" inquiry would operate in a fashion analogous to the principle reflected in the maxim *de minimis non curat lex*—that minor or de minimis incursions upon settled rights do not call for judicial redress. See *Ingraham* v. *Wright*, 430 U.S. 651, 674 (1977).

II. PARENTAL NOTIFICATION REQUIREMENTS ARE REASONABLY DESIGNED TO SERVE LEGITIMATE STATE INTERESTS

Because Minnesota's parental notification statute does not implicate any fundamental right, it should be assessed under the standard of review formulated by the *Webster* plurality. As previously noted, that standard asks whether a particular regulation is "reasonably designed" to serve a legitimate state interest. 109 S. Ct. at 3058. There can be little doubt that the Minnesota statute readily passes muster under this standard.

A. Parental Notification Requirements Advance The Legitimate State Interests Of Informing And Involving Parents In Decisions Affecting The Welfare Of Their Minor Children

The State unquestionably has a legitimate interest in informing and involving parents in decisions affecting the welfare of their minor children. See *Matheson, supra.* This interest clearly extends to the decision whether to have an abortion. "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." *Matheson,* 450 U.S. at 411. And a parental notification requirement, in association with a reasonable waiting period, furthers these legitimate interests. Such laws postpone a minor's decision for a brief period to allow her parents to discuss with her what is likely to be the most important and irrevocable decision of her minority life. A State thus has a significant interest in promulgating a parental notice requirement in order to ensure that a minor will not act improvidently, and to preserve her parents' traditional responsibility for her nurturing and upbringing. *Matheson,* 450 U.S. at 409-413; *id.* at 421-425 (Stevens, J., concurring in the judgment); *Zbaraz* v. *Hartigan,* 763 F.2d 1532, 1548-1557 (7th Cir. 1985) (Coffey, J., dissenting), aff'd by an equally divided Court, 484 U.S. 171 (1987).

The foregoing considerations apply whether or not the minor is determined to be "mature" (*i.e.*, able to give informed consent). The abortion decision "is an important, and often a

stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Danforth,* 428 U.S. at 67. A minor's parents can counsel their daughter about the moral and psychological consequences of her decision, and thereby assist her to make an informed judgment. Parents can also help their daughter select a competent physician, and can supply the physician with necessary medical and psychological information, some of which their child may not know. In addition, parents can provide emotional support both before and after the procedure, and ensure that their child receives any necessary post-operative care. *Matheson,* 450 U.S. at 411; *Zbaraz,* 763 F.2d at 1549-1551 (Coffey, J., dissenting). For these reasons, a State may reasonably conclude that parents' awareness of their daughter's pregnancy and consultation about the options available to her will improve the quality of her decision, even if she is mature. And if she is not, we believe that few would genuinely argue that her parents should not be informed about, and involved in, the decision whether she is to have an abortion. It is well to remember that thousands of minors below the age of fifteen have abortions every year; they should not have to face this profoundly important decision alone.[12]

A State may also reasonably conclude that a hearing before a judge is not an acceptable substitute for notification of the minor's parents. First, the respective roles of judge and parents are manifestly different. The judge is charged with determining either that the pregnant minor is mature or that an abortion is nonetheless in her best interests. In contrast, the parents' responsibility is the overall welfare of their daughter, which encompasses advice on a wide range of considerations bearing on her decision. Second, the background and interest of the judge and

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[12] According to statistics supplied by the Alan Guttmacher Institute, whose Director of Research testified for plaintiffs as an expert on the Institute's statistics, J.A. 97, approximately 16,000 women less than fifteen years old had abortions in the United States in 1983. U.S. Department of Commerce, *Statistical Abstract of the United States* 70 (1989).

the parents are by no means identical. The judge has probably never seen the minor before, will likely never see her again, and his duty lies in discharging his statutory obligations. In contrast, a minor's parents, in the typical situation, will have known and cared for their daughter from her birth, and they will be deeply, lovingly concerned about her well-being. Third, the nature of the judicial proceeding prevents judges from acting as surrogate parents. Hearings are secret (to protect anonymity), abbreviated (to minimize delay), and *ex parte*. Even under the best of circumstances and with the best of intentions, a judge would find it enormously difficult to do anything more than make an educated guess about whether a minor is mature or whether an abortion is in her best interests.[13]

It is also reasonable for Minnesota to insist that both parents be notified where possible. If both parents are married and live together, a two-parent notification rule is no more burdensome than a one-parent notification rule. If the parents are separated or divorced but hold custody jointly, both parents will be responsible for their daughter's welfare and will be interested in her decision. Even if only one parent has custody, the noncustodial parent may well have strong emotional bonds with his or her daughter (and vice versa), and notifying the noncustodial parent may help preserve those ties. Moreover, notifying both parents may help to ensure that the attending physician will receive important medical information. On the other hand, it would be administratively infeasible to notify both parents in "functional" families but not in "dysfunctional" families, at least without establishing an expensive and cumbersome (and highly intrusive) threshold judicial proceeding to distinguish between the two. In lieu of that unwieldy process, Minnesota was entitled to require notification of both parents in all families where both parents can be located "through reasonably diligent effort." Minn. Stat. Ann. § 144.343(3) (West 1989).

[13] The chance that a judge will guess correctly is greatly reduced if he believes that his job is " 'a routine clerical function on my part, like putting my seal and stamp on it.' " Pet. App. 25a (quoting a judge). Moreover, any advice volunteered by the professional staff of an abortion clinic will be limited for similar reasons of role, background, and setting. Peer counseling is even less reliable.

B. Parental Notification Requirements Are Not Subject To Judicial Cost/Benefit Analysis

The district court "f[ou]nd[] as a matter of fact that Minn. Stat. § 144.343(2)-(7) fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors." 88-1125 Pet. App. 42a. That factual finding, if that is what it is,[14] does not contradict the conclusion that parental notification is reasonably designed to advance legitimate state interests. Nor does the district court's "finding" demonstrate that Minnesota's parental notification law is unconstitutional as applied to petitioners. To the contrary, the facts establish that parental notification is valid in the case of the vast majority of unemancipated Minnesota minors.[15]

[14] The district court's conclusion, like many of the court's other "findings," is not a "fact" in the sense used by Fed. R. Civ. P. 52(a) to identify determinations to which an appellate court must defer. Under that rule, only the evidence and legitimate inferences therefrom are reviewed under the clearly erroneous standard; everything else is subject to de novo review. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 714, 715 (1985); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984). Because the district court's conclusion presupposes application of the correct legal standard to the evidence, it is a mixed finding of law and fact to which Rule 52(a) indicates no special deference is owed. See *Bose Corp.*, 466 U.S. at 501; *Turner*, 482 U.S. at 93-94 n.*.

[15] As the court of appeals pointed out, the district court's conclusion that parental notification imposed an undue burden on pregnant minors rested "primarily on its factual findings regarding the burden imposed on minors in family units that have either 'broken apart or never formed.' " 88-1125 Pet. App. 92a-93a. These findings in turn were based on "somewhat limited factual findings" predicated on "the minor living in a one-parent household who notified only her custodial parent." *Id.* at 93a n.16. Accepting the district court's factual findings for all they are worth – namely, that involvement of the non-custodial parent introduces either a "traumatic distraction" or "disruptive and unhelpful participation" and that these events are "not uncommon," *id.* at 22a; see *id.* at 30a-31a – those findings still say nothing about the 58% of Minnesota minors who live with both parents, *id.* at 29a, as well as those minors whose parents naturally take an interest in their welfare even though they are living apart.

The district court's unprecedented inquiry represents, according to one of petitioners' counsel, a new mode of fact-based "across-the-board constitutional challenge" dubbed an "operational challenge." Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights,* 136 U. Pa. L. Rev. 655, 703 (1988). Under this provocative approach, courts are entitled to weigh for themselves the costs and benefits of legislation. Properly understood, this mode of attack has nothing to do with abortion, or even adjudication of claims involving fundamental constitutional rights. Because all legislation must (if challenged) pass muster under the Due Process Clause, this methodology puts every legislative enactment on trial at least to determine whether it is rational. That novel approach, employed by the district court and urged by petitioners, is misguided both in conception and execution.

To begin with, that approach fails to recognize that legislation is a product of a complex collective judgment by a representative body about the desirability or morality of a specific goal, the social utility of different ways to achieve it, and the trade-offs necessary to enact it. There is no scientifically correct answer to any of these questions, and the Constitution does not demand the impossible—that a legislative judgment be error-proof. To the contrary, the Constitution assumes, absent some reason to presume antipathy, that improvident decisions will be rectified by the democratic process. *Cf. Vance* v. *Bradley,* 440 U.S. 93, 97 (1979).

Indeed, petitioners' approach rests on a pervasive confusion of "facts" and legitimate legislative value judgments. The "factual" inquiry pursued by the district court—whether a parental notification requirement, on balance, benefits or harms minors and their parents—touches matters so subjective, value-laden, and contestable that it is almost meaningless to inquire as to their truth or falsity. Indeed, it transforms the judicial process into that of a super-legislature acting outside the constraints of the democratic process.[16] It is ultimately an assault on the right

[16] It is not obvious that statistics, surveys, or expert opinions—the bulk of petitioners' evidence—can confirm or disprove the hypothesis that, as a general matter, a minor's parents should be aware of and involved in her sexual upbringing, since there is no objective standard to guide a court in making that judgment. Nor is the evidence considered by the district court illuminating. The court dismissed the benefits of parental notification by reference to the opinions of experts who, at bottom, simply disagreed with the state legislature that parents can contribute to their daughter's sexual upbringing. See, *e.g.*, 88-1125 Pet. App. 26a-29a.

of the people, subject to constitutional constraints, to govern themselves. When a law is based on normative, not empirical, grounds, the adducing of "expert" opinions merely camouflages personal value judgments as impartial truths. Cf. L. Hand, *The Bill of Rights* 38 (1958). For that reason, the Court has consistently held that constitutional law does not rest on the opinions of experts. *Stanford* v. *Kentucky,* 109 S. Ct. at 2979-2980 (plurality opinion); *Rhodes* v. *Chapman,* 452 U.S. 337, 348-349 n.13 (1981); *Bell* v. *Wolfish,* 441 U.S. 520, 543-544 n.27 (1979).

This Court firmly rejected an approach similar to that now urged by petitioners in *Harris* v. *McRae,* 448 U.S. at 326, which involved the constitutionality of abortion funding restrictions. The district court in that case, after holding a year-long evidentiary hearing into the public funding of abortions, concluded that " '[t]he interests of . . . the federal government . . . in the fetus and in preserving it are not sufficient, weighed in the balance with the woman's threatened health, to justify withdrawing medical assistance unless the woman consents . . . to carry the fetus to term.' " 448 U.S. at 325-326 (quoting district court decision). This Court held that the district court had undertaken the wrong equal protection inquiry and that the question was one for the legislature, not the court, to decide:

> It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply because they may be unwise, improvident,

> or out of harmony with a particular school of thought. Rather, when an issue involves policy choices as sensitive as those implicated [here] . . ., the appropriate forum for their resolution in a democracy is the legislature.

Id. at 326 (citations and internal quotation marks omitted). These observations, grounded firmly in democratic theory, apply with equal force to the wide-ranging "fact finding" undertaken by the district court in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed in No. 88-1125 and reversed in No. 88-1309.

Respectfully submitted.

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OCTOBER 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00548